

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 666 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and  
MR.JUSTICE A.R.DAVE

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? No
2. To be referred to the Reporter or not? No
3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge?

No

-----

SHYAMALAL N KHANDELVEL

Versus

STATE OF GUJARAT

-----

Appearance:

MR. E.E. SAIYED, for MR. MJ DAGLI for Petitioner

MR. U.R. BHATT, ADDL. PUBLIC PROSECUTOR for Respondent No. 1

-----

CORAM : MR.JUSTICE K.R.VYAS and

MR.JUSTICE A.R.DAVE

Date of decision: 13/10/97

ORAL JUDGEMENT

(per A.R. Dave, J.)

The appellant, accused in Sessions Case No. 13/91, was charged with the offences punishable under sections. 20(b)(ii) and 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred

to as the 'NDPS Act'). After the trial the appellant was found guilty of the charges levelled against him and by the judgment and order passed by the ld. Additional Sessions Judge, City Civil & Sessions Court, Ahmedabad in Sessions Case No. 13/91 dated 26.7.1991, he was sentenced to undergo rigorous imprisonment for a period of 10 years and a fine of Rs. 1 lakh and in default of payment of fine to undergo rigorous imprisonment for a period of one year. Being aggrieved by the said judgment and order, the appellant has approached this Court by way of the present appeal.

2. The facts as stated by the prosecution in a nutshell are as under:-

3. On 27.8.1990 around 2000 hrs. P.S.I. Shri M.J. Parmar (P.W. No. 8, Exh. 40) was informed by an informant that a person wearing grey coloured trousers and half sleeved shirt was likely to go towards Sejpur Tower from Saijpur 'patia' (board) with a huge quantity of charas. Upon receiving the said information, Shri Parmar informed the said fact to the concerned Police Inspector of Naroda Police Station. Upon receiving the said information, P.I. of Naroda Police Station Shri A.P. Patel visited Sejpur Police Chowky and thereafter called certain police constables and panch witnesses and they were apprised of the abovementioned information and ultimately it was decided to apprehend the person who was likely to pass through Sejpur Tower with a huge quantity of charas.

4. Ultimately, as arranged by complainant P.S.I. Shri Parmar and P.I. Shri Patel, the concerned constables and the panchas remained present at the place through which the accused was to pass. Upon seeing a person described by the informant, who was going on a cycle, the P.I. alongwith panchas, and complainant P.S.I. stopped the accused and in presence of panchas a bag which was carried by the accused with him was opened at the time of search and from the said bag 7.300 Kgs. of charas was found. The pieces of charas were wrapped in different cloth bags. The bags were duly stitched and after preparation of proper slips duly signed by panch witnesses, seal bearing the name "Police Inspector, Naroda Ahmedabad" was affixed on each bag. Necessary panchnama was drawn at the same place with the help of the panchas and the accused was arrested for having committed the alleged offences. The ld. Additional Sessions Judge had thereafter framed charge at Exh. 1 and as the accused did not plead guilty to the charge, he was tried. Ultimately, after examining complainant P.S.I. Shri

Parmar (P.W. No. 8, Exh. 40), Police Constable Ajit Singh Bhavan Singh (P.W. No. 1, Exh. 7) the panchas and other prosecution witnesses and after considering other evidence and statement of the accused under sec. 313 of the Cr.P.C., the impugned order of conviction was passed by the ld. Addl. Sessions oJudge.

5. Ld. Advocate Shri E.E. Saiyed appearing for the appellant has challenged the validity of the said judgment and order mainly on the ground that the muddamal charas which was seized at the time when the accused was arrested on 27.8.1990 around 2200 hrs. was sent to the F.S.L. on 15.9.1990, that is after 19 days of its seizure. He has submitted that the unexplained delay of 19 days is very fatal to the prosecution case as during the said period the muddamal article was retained in the police custody without any justifiable reason. He has submitted that during the said period the muddamal charas had changed hands from time to time for which no satisfactory explanation has been offered by the prosecution. He has further submitted that after seizure of the muddamal and after doing necessary formalities, it ought to have been forwarded to the F.S.L. without any delay.

6. In support of his above-referred submission, he has relied on the judgment delivered by this Court (Coram: K.G. Shah & K.R. Vyas, JJ.) in Criminal Appeal No. 50/88 on 22.1.1992. The said judgment was subsequently followed by this Court (Coram: S.D. Dave & H.R. Shelat, JJ.) in Criminal Appeal No. 1186/92 decided on 20.6.1996. He has submitted that as per the law laid down in the above-referred two judgments, the muddamal charas ought to have been forwarded to the F.S.L. immediately and without any avoidable delay. As the muddamal was unnecessarily retained by the police before sending the same to the F.S.L., case of the prosecution is vitiated by the said illegality and therefore the appellant should be acquitted.

7. Ld. Advocate Shri Saiyed has also submitted that at the time when the accused was searched, as per provisions of Sec. 50 of the NDPS Act, he was not asked whether he wanted himself to be searched in presence of a gazetted officer or a Magistrate. He has therefore submitted that the prosecution should fail on this count also.

8. We have heard ld. Advocate Shri E.E. Saiyed and ld. A.P.P. Shri U.R. Bhatt at length. As we are inclined to allow this appeal on the first submission

made by 1d. Advocate Shri Saiyed regarding inordinate delay in sending the muddamal article to the F.S.L., we are not dealing with the second submission that the accused was not searched in presence of a gazetted officer or magistrate.

9. So far as the first submission of Shri Saiyed is concerned, prima facie it appears that the delay which was caused in sending the muddamal charas from police custody to the F.S.L. is definitely fatal to the prosecution case. The muddamal charas was seized on 27.8.1990 whereas the said muddamal was received by the F.S.L. on 15.9.1990. The muddamal was sent with Police Constable Shri Ajit Singh Bhavan Singh (P.W. No. 1, Exh. 7). In his evidence he has submitted that the muddamal charas was sealed in his presence on 27.8.1990 as he was also one of the members of the raiding party. He has stated in his further examination-in-chief on 14.5.1991 that on 31.8.1990 he was entrusted with the muddamal charas by his superior officer so that the said muddamal can be delivered to the F.S.L., Ahmedabad for the purpose of its analysis and report. Though he had received the muddamal on 31.8.1990, he could not deliver the same to the F.S.L., Ahmedabad on the same day. According to him, on 31.8.1990 in fact he had been to the F.S.L., Ahmedabad, for the purpose of handing over the said muddamal to the F.S.L. According to him, when he reached the F.S.L. around 1.00 p.m., there was a queue of certain persons who had also to hand over their muddamal to the F.S.L. He was told at the F.S.L. that as the queue was long he should come on the next day to hand over the muddamal and therefore without handing over the muddamal charas to the F.S.L., he returned to the police station and thereafter he handed over the said muddamal to the 'crime writer head' who was in charge of retaining muddamal in the police station. It is pertinent to note here that the said witness has not adduced any evidence to show that in fact on 31.8.1990 he had been to the F.S.L. The said witness is unable to state as to why he did not go with the said muddamal to the F.S.L. on the next working day. The muddamal thus remained with the Naroda Police Station for a considerably long period without any justifiable reason. Thereafter on 15.9.1990 the witness went with the said muddamal to the F.S.L. and ultimately he handed over the same to the F.S.L. on 15.9.1990.

10. Upon perusal of evidence adduced by witness Shri Ajit Singh Bavan Singh (P.W. No. 1, Exh. 7), it is crystal clear that there is no justifiable reason for retaining the muddamal charas in police custody for such

a long period. Even assuming that there was a long queue at the F.S.L. for handing over muddamal on 31.8.1990 and that he had to return without handing over the same, there was no reason for him not to take the said muddamal to the F.S.L. on the next working day. According to his own admission, there were only 7 or 8 persons standing in the queue on 31.8.1990 to deliver their muddamal articles. In our opinion a queue of 7 or 8 persons cannot be said to be a long queue especially when the witness was directed by his higher officer to personally hand over the said muddamal to the F.S.L. on that very day. It also transpires from his evidence that no officer or clerical staff of the F.S.L. had informed him in writing that his muddamal would not be accepted on that day. In such a set of circumstances a normal prudent police constable would surely wait for some time so that he can complete the work entrusted to him. Moreover, the persons who were standing in the queue had only to hand over their muddamal articles to the concerned person of the F.S.L. The process of handing over a sealed packet should ordinarily not take more than a minute. Even if some formalities like filling up of forms etc. were to be done, it should not take more than two or three minutes. In such a case, in normal circumstances, a man of ordinary prudence would have surely waited for his turn so as to complete the task assigned to him. It is also pertinent to note that he had reached office of the F.S.L. around 1.00 p.m. Normally government offices function upto 5 to 6 p.m. He has tried to find an excuse that possibly because of recess time it was not possible for him to deliver the muddamal to the F.S.L. but he could not say anything about recess time in his cross-examination.

11. The witness is not in a position to give any reason as to why he could not hand over the muddamal to the F.S.L. before 15.9.1990. Thus, the prosecution has not come forward with any justifiable reason for not handing over the muddamal charas to the F.S.L. for its analysis as soon as possible.

12. Ld. Advocate Shri Saiyed has rightly relied upon the judgment delivered by this Court (Coram: K.G. Shah and K.R. Vyas, JJ.) in Criminal Appeal No. 50/88. In that case this Court has rightly appreciated the importance of handing over muddamal to the F.S.L. for its analysis immediately after its seizure. It has been observed in the said judgment that delay in handing over muddamal to the F.S.L. would raise suspicion as, during the period of delay, one cannot rule out possibilities of tampering with the seal or tampering with the muddamal.

It is pertinent to note here that the muddamal was sealed in presence of panchas and the complainant. The muddamal was bearing seal of the P.I., Naroda, Ahmedabad. The sealing instrument used to remain in custody of the complainant or his colleagues. If such a sealed muddamal is retained in possession of the complainant or in the police station for unreasonably long period, one cannot rule out possibility of tampering with the seal or the muddamal. So as to see that such a possibility is ruled out, it is expected of the prosecution side to hand over the muddamal to the F.S.L. for its proper analysis as soon as possible and without any avoidable delay.

13. In the above-referred circumstances, one cannot rule out the possibility of the muddamal sample being tampered with by someone so as to adversely affect the accused during the period of 19 days when the muddamal was retained by the police personnel.

14. In spite of all possible efforts, ld. A.P.P. Shri Bhatt could not show any justifiable reason as to why the muddamal charas was retained in police custody from 27.8.1990 to 15.9.1997. In the first judgment referred to hereinabove, the delay in handing over muddamal to the F.S.L. was of 21 days whereas in another case referred to hereinabove, being Criminal Appeal No. 1186/92, the delay was of 26 days. In the instant case the delay is of 19 days. In the circumstances, ld. A.P.P. Shri Bhatt is unable to distinguish facts of the present case from the facts of the judgments referred to hereinabove.

15. Looking to the above-referred set of circumstances, we are constrained to set aside the order of conviction mainly on the ground that the delay in sending muddamal charas to the F.S.L. from the police custody has remained unexplained.

16. As, in our opinion, the above-referred single reason is sufficient for setting aside the order of conviction, it is not necessary for us to deal with another submission made by ld. Advocate Shri Saiyed.

17. In the result, the appeal is allowed. The order of conviction and sentence recorded by the ld. Addl. Sessions Judge, City Civil and Sessions Court, Ahmedabad in Sessions Case No. 13/91 against the appellant accused is set aside. The accused is ordered to be set at liberty forthwith unless he is required in any other case.

